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IN THE

Supreme Court of the United States

October Term, 1975

No. 75 979

LEVA ADKINS, ADMINISTRATRIX OF THE ESTATE OF EVERETT HARMON ADKINS, DECEASED,
PETITIONER,

-v-

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
RESPONDENTS.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 979

LEVA ADKINS, ADMINISTRATRIX OF THE ESTATE OF EVERETT HARMON ADKINS, DECEASED,
PETITIONER,

-v-

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
RESPONDENTS.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

To the Chief Justice and the Associate Justices of
the Supreme Court of the United States:

The Petitioner, Leva Adkins, Administratrix of the Estate of Everett Harmon Adkins, Deceased, respectfully prays that the Motion to Dismiss of the Respondents herein, dated February 9, 1976 be denied.

THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS IN THE CASE AT BAR WAS NOT FILED OUT OF TIME AND THIS COURT IS FULLY VESTED WITH JURISDICTION TO HEAR AND DECIDE THE QUESTIONS PRESENTED

This case encompasses a unique fact situation in that the Justices of the Supreme Court of Illinois, as Defendants in the collateral civil rights litigation, *Adkins v Honorable Robert C. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974), *affirmed*, 520 F. 2d 890 (7th Cir. 1975) *(per curiam), cert. denied*, No. 75-572 (December 8, 1975), expressly abstained from rendering final judgment in this case, in order to permit Petitioner, as Plaintiff in that case, the opportunity to seek injunctive relief restraining the entry of a final order and to seek enforcement of the Federal rights which she has asserted.

In *Market Street [illegible] Co. v Railroad Commission of California*, 324 U.S. 548, 551 (1945), Mr. Justice Jackson articulated this Court's test of finality as follows:

> Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Two circumstances are present in this case which compel the conclusion that the final order, from which the time period set forth in 28 USC § 2101 began to lapse, was the order entered on October 14, 1975 when measured against the *Market Street Rwy. Co.* test.

First, the specific action of the Supreme Court of Illinois was expressly intended to preclude the entry of final judgment. This was not the "latent power" inherent in any court to correct or modify its decisions and judgments, but an extraordinary step specifically taken by the Supreme Court of Illinois in this case and for the explicit purpose of "further review or correction" following conclusion of the *Adkins v Honorable Robert C. Underwood* litigation. Further, the Supreme Court of Illinois agreed to withhold entry of a final order so that Federal injunctive relief

would be effective, since once final judgment was entered, the issue before the United States District Court would have become moot and that Court would have been divested of its injunctive powers.

Second, that the order entered on October 14, 1975 was indeed the final order is indicated by the fact that Respondents did not, and could not, seek the entry of costs until that date. Thus, the provisions of Smith-Hurd Ill. Rev. Stat. Ann. Ch. 33, §7 (as amended, 1967) read in pertinent part as follows:

> If any person shall sue in any court of this state, in any action, wherein the plaintiff might have costs in case judgment be given for him, and he be non-pros'd, or suffer a discontinuance, or be non-suited after appearance of the defendant, or a verdict pass against him, then the defendant shall have judgment to recover his costs against the plaintiff (except against executors or administrators prosecuting in the right of their testator or intestate), to be taxed, and the same shall be recovered of the plaintiff, by like process as the plaintiff might have had against the defendant, in case judgment had been given for such plaintiff.

In Illinois, the right to costs does not become vested until final judgment has been pronounced. *Ambrosius v O'Farrell*, 161 Ill. App. 80, 82 (1912). And further, under Illinois practice, taxation of costs must occur within thirty days of the entry of judgment. Smith-Hurd Ill. Rev. Stat. Ann. Ch. 110, §68.1(3) (as amended, 1973) Cf. *Eugene Matanky & Associates, Inc. v Onixt*, 74 Ill. App. 2d 53, 219 N.E. 2d 865 (1966); *Kostbade v Telford*, 13 Ill. App. 3d 961, 301 N.E. 2d 321 (1973). Otherwise, the trial court loses jurisdiction of the case and cannot tax costs. *Ibid.*

In *Gospel Army v City of Los Angeles*, 331 U.S. 543, 548 (1946), Mr. Justice Rutledge emphasized in a unanimous decision of this Court:

> . . . the modern rule is that this Court will examine both the judgment and the opinion as well as other circumstances which may be pertinent . . . .

It is respectfully submitted that an examination of the other pertinent and extraordinary circumstances of this case requires the conclusion that the final order entered in this case was the order entered on October 14, 1975.

Moreover, it is respectfully, but strenuously, urged that the decision of the Supreme Court of Illinois to expressly reserve entry of final judgment until final adjudication of the collateral

civil rights litigation should be accorded great weight in the determination of the finality question raised by Respondents.

Finally, the questions presented are of such substantial calibre that any doubt created by this issue should be resolved in favor of the Petitioner.

RESPONDENTS HAVE MISSTATED THE EXTENT AND EFFECT OF THE PROCEEDINGS WHICH TRANSPIRED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA AND IN THE CIRCUIT COURT FOR ROCK ISLAND COUNTY

The Petition for Writ of Certiorari in this case raised four Federal questions: (a) attachment of prejudice by a State Court to a dismissal without prejudice entered by a U. S. District Court; (b) determination of the question of *forum non conveniens* adverse to Petitioner absent an opportunity to be heard; (c) denial of access to the State courts of Illinois to a citizen of the State of Michigan in order to sue two Illinois citizens who could not and would not be sued in any other jurisdiction; (d) determination that Petitioner's joinder of the two individually named Respondents was in "bad faith" absent a hearing and in the face of evidence upon which the jury, the trial court, and a unanimous intermediate appellate court concluded that there was liability.

With respect to the first of these, Respondents suggest that Petitioner is "twisting . . . the record" (Respondents' Motion to Dismiss, pp. 10-11) and that the counsel for the Respondent Railroad entered into the Stipulation for Dismissal pursuant to Rule 41(a) (1) of the Federal Rules of Civil Procedure only "to dispose of a half million dollar lawsuit . . . . " *(Id.)* This contention is belied by the very text of the Rule. Thus, the Rule provides in pertinent part:

> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

As Mr. Justice Goldenhersh pointed out in his dissent in this case, 54 Ill. 2d at 525, 301 N.E. 2d at 736:

> By this decision the majority, without any evidentiary basis, have made findings of fact with respect to plaintiff's good faith . . . and have decided not only that the trial court absued its discretion and that the appellate

> court erred, *but also that the Federal district judge somehow abused his discretion when he permitted plaintiff to dismiss her action without prejudice.* The record contains no basis to presume that the district judge was so lacking in perception as to fail to detect that plaintiff's motion for voluntary dismissal was filed for the "unseemly" purpose of taking "an appeal to the Illinois courts" from his rulings.
>
> [Emphasis added].

In addition, Rule 41(b) provides:

> (b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

If any part of the rationalle now advanced before this Court by Respondents' counsel existed in the United States District Court for the Southern District of Iowa, final disposition of this case would have been sought by them, then and there, pursuant to Rule 41(b), *supra*, with prejudice.

With respect to the second of these issues, the Respondents state "that there was in fact a hearing on the doctrine of *forum non conveniens* where counsel for both parties were represented." (Respondents' Motion to Dismiss, p. 10). In this case, *no hearing was ever held.* No evidence was introduced in support of Respondents' contention that the trial court should decline jurisdiction on the basis of *forum non conveniens;* no examination or cross-examination was had; and no opportunity for Petitioner to be heard was afforded. The trial court decided that the joinder of the two individually named Respondents *precluded the holding of a hearing.* The two individually named Respondents did not even raise the issue of *forum non conveniens* prior to verdict. At no time, was the Petitioner given the opportunity to contest the determination that Illinois was not a convenient forum for any of the Respondents. And in fact, it has been the contention of Petitioner throughout the pendency of these proceedings that Rock Island, Illinois, is the *most* convenient forum in which to present this case; and, at all times, Petitioner has been ready, willing, and able to present evidence to prove that Rock Island County, Illinois is the most convenient forum, *if she is afforded a hearing.*

In this light, Petitioner was not accorded minimum due process.

CONCLUSION

Petitioner respectfully prays that this Honorable Court shall enter an Order denying the Respondents' Motion to Dismiss and granting the Petition for Writ of Certiorari addressed to the Supreme Court of Illinois in the instant case.

Respectfully submitted,

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Cooper, Rine, King and
Atkinson
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Des Moines, Iowa 50309

FRANK SCHUBERT
403 Safety Building
Rock Island, Illinois 61201

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Memorandum in Opposition to Motion to Dismiss was served in triplicate upon counsel for Respondents herein, by posting copies of same in the United States Mail this 16th day of February, 1976 pursuant to Rule 33.1 of the Rules of the Supreme Court of the United States.

HARRY M. PHILO

APPENDIX

IN THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
GENERAL DIVISION

LEVA ADKINS, Administratrix of the Estate of EVERETT HARMON ADKINS, Dec. v. Plaintiff

CHICAGO, ROCK ISLAND & PAC. RAILROAD COMPANY, R. V. LOFTUS & W. B. THROCKMORTON Defendants

No. 68 L 69

NOTICE OF HEARING

TO: Frank G. Schubert, 403 Safety Bldg., Rock Island, IL
Harry M. Philo, 4th floor-409 Griswold, Detroit, Mich. 48226
Vern Lawyer, 4th floor-Fleming Bldg., Des Moines, Ia. 50309

On Monday, December 1, , 1975 , at 2:50 o'clock P. M. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Presiding Judge ~~or any Judge sitting in his stead,~~ in the court room usually occupied by him in Circuit Court General Division Rock Island County Courthouse, Rock Island, , Illinois.

then and there for hearing on defendant's, Chicago, Rock Island and Pacific Railroad Company, Motion for Judgment for Costs.

Name Coryn and Walker
Attorney for C.R.I.&P. R.R. Co.
Address 312 First Nat'l Bank Bldg.
City Rock Island, IL 61201
Telephone (309) 788-6301

Copy received , 19 , at , M.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
GENERAL DIVISION

LEVA ADKINS, Administratrix of the Estate of EVERETT HARMON ADKINS, Deceased,	)	
Plaintiff,	)	
vs.	)	
	)	NO. 68 L 69
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, R. V. LOFTUS and W. B. THROCKMORTON,	)	
Defendants.	)	

MOTION FOR JUDGMENT FOR COSTS

Comes now the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, by its attorneys, Coryn and Walker, and hereby moves this court to enter judgment for defendants and against plaintiff, the Estate of Everett Harmon Adkins, for costs incurred in this matter and as grounds therefore, states as follows:

1. That such a judgment for costs is in accordance with the mandate of the Supreme Court entered October 10, 1973, a copy of which mandate is attached hereto, marked Exhibit "A" and made a part hereof.

2. That the Clerk of the Supreme Court executed a statement of costs due in the way of a Bill of Costs in the sum of $2,645.80 a copy of which Bill of Costs is attached hereto, market Exhibit "B", and made a part hereof.

WHEREFORE, defendants pray that this court enter judgment for defendants in the sum of $2,645.80 together with interest at the rate of six percent (6%) from and after June 4, 1973, all in accordance with the mandate of the Supreme Court and the Bill of Costs.

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY, Defendant

By _____

For: Coryn and Walker,
Its Attorneys

CORYN AND WALKER
Attorneys for Chicago,
R.I. and Pacific R.R. Co.
312 First National Bank Bldg.
Rock Island, Illinois 61201
Phone: (309) 788-6301

United States of America

State of Illinois } ss.
Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the
May in the year of our Lord, one thousand nine hundred and
seventy-three, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE DANIEL P. WARD — JUSTICE CHARLES H. DAVIS
JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL
ROBERT G. MILLS, MARSHAL
ATTEST: JUSTIN TAFT, CLERK

BE IT REMEMBERED, that, to-wit: on the 4th day of June 1973, the
one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and
entered of record, to-wit:

Chicago, Rock Island and Pacific Railroad Company; W. B. Throckmorton; and R. V. Loftus,

Appellants

No. 44876 vs.

Neva Adkins, Administratrix of the Estate of Everett Adkins, Deceased,

Appellee

Appeal from
Appellate Court
Third District
69 - 335
68 - L - 69

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgments aforesaid, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgments of the Appellate Court of the Third District and the Circuit Court of Rock Island County

in this behalf rendered BE REVERSED ENTIRELY, SET ASIDE AND WHOLLY FOR NOUGHT HOLDEN, and this cause is remanded to the Circuit Court of Rock Island County with directions to grant the motion to dismiss.

And it is further considered by the Court that the said appellants recover of and from the said appellee costs by them in this behalf expended to be taxed, and have execution therefor in due course of administration

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 10th day of October, 1973.

EXHIBIT "A"

Clerk.

Form 19

Supreme Court of Illinois

BILL OF COSTS

JUSTIN TAFT, Clerk of Supreme Court,
Supreme Court Building
Springfield, Illinois

Chicago, Rock Island and Pacific Railroad Company; et al.,
Appellants

No. 44876 vs.

Leva Adkins, Admrx., etc.,
Appellee

Error to

Appeal from Appellate Court Third District

Petition for Leave to Appeal

Compensation

Transcript from Court below,	$	30.00
Appellate Court Record,		
Short Record,		
Abstract,		2,600.80
Additional Abstract,		
Publisher's Fee, (Notice of Non-Residence)		
Sheriff's Fees,		
Docket ~~Appearance~~ Fee paid by, Appellants		75.00
Total Amount of Costs, due from Appellee	$	2,645.80

I, JUSTIN TAFT, Clerk of the Supreme Court, do hereby certify the foregoing to be a correct statement of costs due from and unpaid by Appellee, in the above cause, as the same appears of record in my office.

Given under my hand and the Seal of the Supreme Court this 14th day of November A. D. 19 73.

To Klockau, McCarthy, Lousberg, Ellison & Rinden
Address 1808 Third Avenue
Rock Island, Ill. 61201

(S E A L)

/s/ Justin Taft,
Clerk,
Supreme Court of Illinois.

Attorney for Appellee.

14 (3547—M—11 68)

EXHIBIT "B"